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Supreme Court, U.S.
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No. 96-181

In The

Supreme Court of the United States

October Term, 1995

VANCE ALLRED,

Petitioner,

v.

A.L.L. and D.M.L. (ADOPTIVE PARENTS) AND ADOPTION CENTRE OF KANSAS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does termination of a natural father's parental rights, based upon a finding that he failed to provide support to the natural mother during her pregnancy and confinement and an additional finding that the natural father is unfit as a parent, pursuant to a statute of the state having jurisdiction over an adoption proceeding, where the father had notice and an opportunity to be heard, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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BRIEF IN OPPOSITION

The Respondents, A.L.L. and D.M.L. and Adoption Centre of Kansas, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Kansas Court's opinion in this case. The natural father ("V.A."), admitted that the Kansas court had valid jurisdiction. Even though jurisdiction is the primary basis for determining the choice of law in adoption proceedings, V.A. seeks to suggest that he can still complain about the constitutional application of Kansas law.

STATEMENT OF THE CASE

The natural mother ("R.S.") and natural father of Baby Boy S lived together in Ohio at the time of conception of the child. The couple's relationship was stormy, with conflicts arising over, among other things, V.A.'s attempts to control R.S., insisting that she should have no contact with her own parents, and that she should control her wandering ways. V.A.'s controlling personality and his fits of rage led his mother to require V.A. and R.S., to move from her home, where they were living, because he would throw furniture and food and knock holes in walls and doors. R.S. and V.A. then moved into an apartment. R.S. later moved from the apartment when V.A. became enraged and violent, hitting her parents' car and leaving a dent in the hood, after he learned that, due to her loneliness, she had talked to her parents.

R.S. was terrified by V.A.'s behavior on another occasion when she and a friend encountered him in a shopping mall. V.A. shouted at the women, chased them and

cornered them in a store. The friend told V.A. that R.S. had suffered a miscarriage, however, within approximately one month, V.A. learned that the information was untrue when he received notice from an adoption agency in Texas that R.S. was pregnant and had identified him as the father of the child. In spite of his knowledge that R.S. was pregnant and might leave Ohio, V.A. took no action to locate her, either through the Texas agency, through R.S.'s family or mutual friends, in an attempt to provide any form of support for her or the unborn child.

An attorney, contacted by V.A.'s father, provided the family with a copy of a letter he had written to the Texas adoption agency in which he stated V.A.'s opposition to the adoption of the child. A notation on the letter indicated that the letter "should take care of the situation until the baby is born." Thus V.A. knew that it was important for him to take some action to preserve his parental rights at or before the time of the baby's birth. V.A. knew that the child's due date was on April 26, 1994, yet he took no action to find R.S. during the time period from January, 1994 until more than two months after the birth of the baby, although R.S. could easily have been located in Kansas prior to the birth of the child, and V.A. was told in April that R.S. was in Kansas. V.A. also took no action to contact or support the mother or child for more than two months after the child's due date.

V.A. failed to provide any support for R.S. after the time she left the apartment where the couple lived together. Although V.A. expressed his intention to be responsible for the child, he took no action to provide support for the mother or baby either during the pregnancy or at the time he knew the birth was expected.

Instead, V.A.'s family forwarded an unpaid bill for R.S.'s medical care related to the pregnancy, to R.S. The bill was then paid by R.S.'s parents.

V.A.'s counsel admitted the Kansas court had jurisdiction and the court found it had jurisdiction under the Uniform Child Custody Jurisdiction Act. Kan. Stat. Ann. § 38-1301, *et seq.* The court then concluded choice of law rules warranteed the application of Kansas law. Based upon the testimony presented at trial, the court found that the natural father failed without reasonable cause to provide support for the mother during the six months prior to the birth of the child and that the natural father is unfit as a parent due to his failure to support the child when it was born, because of his violent temper and his unlawful use of marijuana. Based upon these findings, the court ordered that the parental rights of V.A. in Baby Boy S should be terminated. The child has been in the custody of the adoptive couple since April 29, 1994. A final decree of adoption, was entered on May 28, 1996. No motion was filed to stay the entry of the final decree of adoption.

REASONS FOR DENYING THE WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be dismissed or denied. The Court does not have jurisdiction to review the case pursuant to 28 U.S.C. § 1257(a) because the petition purports to be for writ of certiorari to the Eighteenth Judicial District, which is not the highest court

of the state of Kansas. Additionally, the judgment below rests on independent and adequate state grounds and an opinion herein would be nothing more than an advisory opinion. Nor has petitioner identified any conflict between the trial court decision and that of any other court of last resort of any state or any other federal appellate court which would justify review by the Supreme Court.

V.A. requests the Court to disregard a father's moral and common law obligation to support or maintain contact with a natural mother during her pregnancy if he wants a voice in the child's placement. Instead, V.A. asks the Court to adopt the propositions which are presented without the benefit of citation or authority, that he is entitled to "fair warning" of the provisions of any state statute which might be used to terminate his parental rights. Secondly, V.A. requests the Court to accept his assertion that he did not receive notice that his parental rights would be severed according to the terms of Kansas statutes. V.A.'s arguments must fail for the reason that both Ohio, the home state of V.A., and Kansas require a father to provide support for the mother of an unborn child, and for a child subsequent to its birth. Ohio and Kansas statutes and the common law of both states recognize that a father has an obligation to provide the mother with support during pregnancy and confinement. Most significantly, a father has a recognized moral duty to provide care and support to his child. Accordingly, V.A.'s ignorance of specific provisions of the Kansas statute, or of its application to terminate his parental rights does not constitute a violation of his right to due process.

Where, as here, a birth father has notice of a proceeding in which his parental rights may be terminated and an opportunity to be heard, courts have held that such father has been accorded due process. V.A. received notice and had an opportunity to be heard. The court determined that V.A.'s parental rights should be terminated due to his failure to fulfill parental duties and due to a finding that V.A. is unfit as a parent.

Similarly, V.A.'s argument that his right to due process was violated by the application of Kansas law to the termination proceeding must fail. V.A. conceded that the Kansas court had jurisdiction over the termination proceeding. Additionally, the court exercised its jurisdiction pursuant to the terms of the Uniform Child Custody Jurisdiction Act, and accordingly applied its own state law to a determination of an adoption issue. Choice of Kansas law is not constitutionally impermissible, as Kansas has a significant state interest in making determinations regarding parental rights and adoptions within the state.

Moreover, application of Ohio law to the termination proceeding would have resulted in V.A.'s parental rights being severed. Thus V.A. has not been deprived of a fundamental right without due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED OR DENIED

Petitioners invoke the jurisdictional statute, 28 U.S.C. § 1257(a), which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. The petition herein purports to be for writ of certiorari to the Eighteenth Judicial District, Sedgwick County, Kansas, which is not the highest court of the state for purposes of the statute. Therefore, the Court does not have jurisdiction to review the judgment of the Eighteenth Judicial District, Sedgwick County Kansas, and the petition for writ of certiorari should be dismissed.

Additionally, because the judgment below rests on independent and adequate state grounds, the petition for writ of certiorari should be dismissed or denied. The Supreme Court has long held that it will not review state court decisions which are based upon independent and adequate state grounds, for the reason that determinations of the federal questions raised in such cases would amount to no more than advisory opinions. *See Michigan v. Long*, 463 U.S. 1032, 1037-39 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Moreover, petitioners have failed to identify any conflict whatsoever between the decision below and that of any other court of last resort of any state or any other federal appellate court. The cases listed by petitioners at page eighteen of their brief, are not in conflict with the opinion of the court below. Rather, those cases hold that

statutes providing for termination of parental rights have to pass a constitutional vagueness test. There is no argument raised by petitioners that the Kansas statute applied to terminate the natural father's parental rights is unconstitutionally vague. Therefore, all of the cases cited by petitioners are inapposite and present no conflict. The petitioners themselves acknowledge that they were unable to find any reported case which applies the due process conflicts of law analysis of *Allstate Insurance Co. v. Hague*, 449 U.S. 302, *reh. denied*, 450 U.S. 971 (1981), to a fact situation where a fundamental liberty interest is at stake. (Petitioners' Brief at 24). Accordingly, petitioners present no case which conflicts with the decision below which would justify review by the Supreme Court.

II. TERMINATION OF THE NATURAL FATHER'S PARENTAL RIGHTS DID NOT VIOLATE HIS RIGHT TO DUE PROCESS

V.A. argues that his right to due process, guaranteed by the Fourteenth Amendment to the United States Constitution, was violated because he was entitled to fair warning of statutory requirements or prohibitions which could lead to the termination of his parental rights to Baby Boy S, and that he did not receive such warning. Arguing that a parent's right to the care and custody of his or her child has been recognized as fundamental and is thus entitled to special protections, V.A. requests the Court to accept the proposition that he was entitled to be advised of the provisions of any adoption statute under which his parental rights might be severed. In support of his argument, V.A. provides cites to a series of cases, all of which are inapposite to the instant matter. (Petitioner's

Brief at 18). The cited cases deal with statutes which have been challenged as unconstitutionally vague, however, the Kansas adoption statutes are not challenged for failure to provide notice because of vagueness. V.A. merely argues that he did not know the provisions of the Kansas statute or that the Kansas statute might be applied to terminate his parental rights.

V.A.'s assertion that he was entitled to fair warning of the provisions of any state statute under which his parental rights could be terminated completely misses the mark. All natural fathers have a recognized obligation to provide care and support for their children. *See In re Adoption of Hart*, 577 N.E.2d 77 (Ohio App. 1989); *In re Adoption of F.A.R.*, 242 Kan. 231, 747 P.2d 145 (1987); *In re Adoption of Wilson*, 227 Kan. 803, 610 P.2d 598 (1980). No statute is required to place a father on notice that he must support or seek to maintain contact with the mother of his child in anticipation of the child's birth. Moreover, fathers need no warning of their duty to form a familial relationship with their children, providing financial and emotional support, after their birth. Thus, regardless of where conception occurs, where each natural parent elects to live during the pregnancy, or the various states' adoption statutes, a natural father who knows of the pregnancy has an obligation to support and maintain contact with the birth mother during the pregnancy and at the time of the birth of the child. In today's mobile society, it is not uncommon for the natural mother and natural father to reside in different states and move during the pregnancy. Conception often occurs in another state and the adoptive parents reside in yet another state. The moral duty of support and to maintain contact with

the mother is known to the natural father despite this mobility or the existence or wording of a particular statute.

The rationale of state statutes used to balance conflicting parental rights is to test the strength of the relationship or indications of parenting qualities in relation to whether the parent objecting to an adoption should interfere with the other parent's decision to place a child for adoption. Although statutes vary from state to state, most ensure that these goals are met, requiring parents, including fathers, to meet their moral obligation to support their children. In an adoption, the father must support and maintain contact with the mother prior to the child's birth and support the child after its birth. As an example, Kan. Stat. Ann. § 59-2136(h)(1994), provides as follows:

> the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: . . .
>
> (2) the father is unfit as a parent or incapable of giving consent; . . .
>
> (4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
>
> (5) the father abandoned the mother after having knowledge of the pregnancy; . . .

Id.

Similarly, Ohio, the state where V.A. resides, expressly recognizes that the birth father owes a duty to the mother and child both prior to and at the time of the

child's birth. Ohio Rev. Code Ann. § 3107.07 (Baldwin 1994) provides in relevant part:

> [c]onsent to adoption is not required of any of the following: . . .
>
> (B) The putative father of a minor if the putative father fails to file an objection with the court, the department of human services, or the agency having custody of the minor . . . or files an objection with the court, department, or agency and the court finds . . . that he has willfully abandoned or failed to care for and support the minor, or has abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first; . . .

Id.

Additionally, Ohio courts recognize a common law duty of the natural father to provide support to the birth mother during the pregnancy and confinement. *See In re Adoption of Hart*, 577 N.E.2d 77 (Ohio App. 1989)(birth father's failure to support mother during pregnancy constituted willful abandonment of the mother); *In re Adoption of Youngpeter*, 583 N.E.2d 360 (Ohio App. 1989)(father's duty of support of child includes obligation to pay expenses of the mother's pregnancy and confinement). From the *Hart* and *Youngpeter* cases it is evident that Ohio uses the term "abandonment" to encompass both concepts stated separately in the Kansas statute – predelivery support and predelivery duty not to abandon.

Thus V.A., who had knowledge of the pregnancy, had fair warning under the statutes and common law of Ohio, that he was obligated to provide support for the birth mother during the pregnancy and confinement and that he had a duty to provide support for the child at the time of its birth. Moreover, V.A. had knowledge that R.S. was a wanderer and that another state's adoption statutes might be utilized to terminate his parental rights. Accordingly, V.A.'s claim that his failure to receive fair warning that his parental rights could be terminated pursuant to statutes like those in Ohio and Kansas constitutes a violation of his right to due process, is without merit.

This Court has repeatedly articulated the rule that a father is entitled to notice of a judicial proceeding which would permanently deprive him of his parental rights. If the father is given timely notice, and an opportunity to be heard, and the petitioners for adoption meet their burden to show that a father's consent is not required, then due process has been accorded to him. *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965). V.A. received notice and an opportunity to be heard in a proceeding in which V.A. admitted, and never challenged the constitutionality of a Kansas court exercising jurisdiction over the adoption proceeding. Thus he cannot complain when the Kansas court terminated his parental rights, not only for his failure to meet his parental duties, but by a finding that he is unfit as a parent.

III. CHOICE OF KANSAS LAW SATISFIES FOURTEENTH AMENDMENT DUE PROCESS REQUIREMENTS

The trial court determined, and the Kansas Court of Appeals affirmed, that a state exercising jurisdiction over an adoption proceeding applies its substantive law in a proceeding for termination of parental rights. The Uniform Child Custody Jurisdiction Act ("UCCJA"), as enacted in Kansas, Kan. Stat. Ann. § 38-1301 (1993) *et seq.*, provides a statutory directive regarding whether Kansas courts should exercise jurisdiction in custody determinations. The trial court held that jurisdiction was appropriate, pursuant to the UCCJA, in this proceeding as the child had only lived in Sedgwick County, Kansas, the mother, the prospective adoptive parents and the adoption agency were residents of Kansas and the natural father filed a paternity action in Kansas. Additionally, V.A. did not contest and, in fact, conceded that the trial court had jurisdiction. (Conclusions of Law, Paragraph 1). The UCCJA is applicable to proceedings for termination of parental rights, *In re L.C.*, 18 Kan. App. 2d 627, 630, 857 P.2d 1375 (1993), and adoption proceedings. *In re Adoption of Baby Girl B*, 19 Kan. App. 2d 283, 285-86, 867 P.2d 1074 (1994).

The statutory directive allowing a Kansas court to exercise jurisdiction over this dispute inherently incorporates Kansas choice of law decisions. The general rule, recognized in Kansas, is that a state which has jurisdiction applies its own state law in determining adoption matters. *See In re Adoption of Gates*, 6 Kan. App. 2d 945, 636 P.2d 818 (1981). Thus, a termination of parental rights in an adoption, when legally ordered pursuant to the

laws of the forum, will be recognized and given effect in other states, so long as the determination and the results flowing therefrom are not repugnant to the policies of the other states. *See* 2 Am. Jur.2d *Adoptions* § 27 p.897.

V.A. has not shown that application of Kansas law to termination of his parental rights is repugnant to the policies of Ohio, which provide by statute for adoption without the consent of putative fathers who fail to comply with common law and statutory duties. Moreover, even if the trial court had applied Ohio law, V.A.'s parental rights would have been terminated for: (1) failing to provide support for the natural mother and child, (2) for failing to provide for the expense of the birth of the child. *See In re Adoption of Hart*, 577 N.E.2d at 83; *In re Adoption of Youngpeter*, 583 N.E.2d at 363, or (3) failing to object to the adoption of Baby Boy S within thirty days after placement with the adoptive couple or filing the petition for adoption. Ohio Rev. Code Ann. § 3107.06(F)(4); § 3107.07(B) (Baldwin 1993).

The court in *In re Adoption of Hart*, applied Ohio law to terminate the rights of a natural father in a case in which conception of the child occurred in Florida. The natural father was a resident of Florida. The natural mother left Florida to return to Ohio to live with her parents during the last five months of her pregnancy, but went back to Florida after the birth of her child. The natural mother and child lived with the paternal grandparents for several months before the mother returned once again to Ohio where she decided to place her baby for adoption. The court determined that the natural father

had failed to meet his parental duties as established by the Ohio statute and affirmed the trial court's determination that the Florida father's consent to the adoption was not necessary. 577 N.E.2d at 83. The case is instructive, indicating that in our current mobile society, the place of conception of a child or the father's residency carries little weight in a determination of what state law should apply to an adoption proceeding. Rather, requiring an unwed father to remain in contact with and support a natural mother during her pregnancy is not an unreasonable requirement.

Thus V.A. has not demonstrated that termination of his parental rights pursuant to the laws of Kansas has violated his right to due process. The court correctly determined that application of Kansas law is constitutionally permissible. The state has a significant contact or aggregation of contacts creating state interest. Accordingly choice of Kansas law is neither arbitrary nor fundamentally unfair. *See Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13, *reh. denied*, 450 U.S. 971 (1981). Additionally, the outcome of the termination hearing would have been identical if Ohio law, rather than Kansas law, had been applied.

V.A. is arguing that in this case, the conflicts of law question as a factual matter, crosses the due process line. That is not the sort of question which is appropriate for Supreme Court review.

CONCLUSION

The Kansas Court of Appeals and the Kansas Supreme Court have determined that V.A.'s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution were not violated by application of Kansas law in a proceeding to terminate his parental rights. The decision does not conflict with previous decisions of the United States Supreme Court. Accordingly, we respectfully request the Court to deny the Petition for Writ of Certiorari filed herein.

Respectfully submitted,

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